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No. 84-216

In The

Supreme Court of the United States

October Term, 1984

BOARD OF TRUSTEES, MIAMI TOWNSHIP,
Petitioner,

vs.

CITY OF MIAMISBURG,
CITY OF WEST CARROLLTON,
CITY OF MORAINE, and
ROBERT L. RODERER, Auditor of
Montgomery County, Ohio,
Respondents.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE SECOND DISTRICT COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

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I. QUESTION PRESENTED FOR REVIEW

Does a political subdivision of a state have standing to contest the constitutionality of a state law?

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II. STATUTORY PROVISIONS INVOLVED

A. Ohio Revised Code Annotated Section 503.07 (Page 1979)

When the limits of a municipal corporation do not comprise the whole of the township in which it is situated, or if by change of the limits of such corporation include territory lying in more than one township, the legislative authority of such municipal corporation, by a vote of the majority of the members of such legislative authority, may petition the board of county commissioners for a change of township lines in order to make them identical, in whole or in part, with the

limits of the municipal corporation, or to erect a new township out of the portion of such township included within the limits of such municipal corporation. The board, on presentation of such petition, with the proceedings of the legislative authority authenticated, at a regular or adjourned session, shall upon the petition of a city change the boundaries of the township or erect such new township, and may upon the petition of a village change the boundaries of the township or erect such new township.

B. Ohio Revised Code Annotated Section 709.19 (Page Supp. 1983)

The text of this statutory provision appears in the appendix to this petition.

III. STATEMENT OF THE CASE

On October 7, 1980, the City of Miamisburg, Ohio, enacted two ordinances accepting for annexation to the city two separate areas of petitioner, Miami Township. One area annexed contained 342 acres, the other contained 277 acres. Both annexations were proper and pursuant to Ohio law. The Cities of West Carrollton, Ohio and Moraine, Ohio, also completed annexations of territory within the twelve-month period from August 10, 1980 to August 9, 1981.

Ohio law allows a municipality to adjust its boundaries and by so doing detach itself from the surrounding township. This action is authorized by Ohio Revised Code Section 503.07. When a municipality exercises this option

and detaches itself from the township, the municipality becomes its own territorial township, but this territorial township ceases any function as a civil township. The municipality exercises all civil authority within its corporate limits. The unincorporated territory remaining with the township retains its civil function as a political subdivision. Ohio Attorney General Opinions, OAG 77-031; OAG 1954-4642.

However, when a municipality does not exercise this option available to it under Section 503.07 of the Ohio Revised Code, the municipality remains a part of the civil township. *Halsey v. Ward,* 17 Ohio St. 543 (1867). With this alternative the residents of the municipality retain their right to vote for township trustees, and they continue to pay a certain percentage of property taxes on their property to the township. In short, the municipality remains a part of the township as a political subdivision.

The respondent, City of Miamisburg, has not exercised this option authorized under Section 503.07 of the Ohio Revised Code. Thus, the City of Miamisburg remains a part of Miami Township. On the other hand, the City of West Carrollton has taken this action and no longer is part of the territory of Miami Township. The respondent, City of Moraine, has exercised this option for part of its territory, but has not as yet taken the action for some of its more recent annexations.

The Ohio legislature enacted Senate Bill 138 and it became effective as law on December 27, 1979. This bill was codified as Ohio Revised Code Section 709.19 (Page Supp. 1983). Section 709.19 provides for a system of compensating a township when a designated percentage of

its total taxable property has been annexed by a municipality or municipalities within a twelve-month period.

The respondent, City of Miamisburg, notified the Montgomery County Auditor that it deemed itself entitled to the real, public utility, and tangible personal property taxes paid within the annexed territories after the November 7, 1980, effective date of annexation. The petitioner, Board of Trustees, Miami Township, also informed the Auditor that it considered itself entitled to those tax monies due to the enactment of Section 709.19 of the Ohio Revised Code. These conflicting claims for the same tax monies prompted the Montgomery County Auditor to file a complaint on July 19, 1982, requesting a judicial interpretation of Section 709.19 and a declaratory judgment.

A trial was held in the Common Pleas Court of Montgomery County on November 4, 1982, before the Honorable William H. Wolff, Jr. Judge Wolff decided that for the purposes of Section 709.19 of the Ohio Revised Code, the term "township" did not include a municipal corporation contained within that township that had never exercised its option to detach itself from that township. This decision was filed on March 30, 1983.

The Cities of Miamisburg, West Carrollton, and Moraine appealed to the Court of Appeals for the Second Appellate District, Montgomery County, Ohio. One of the issues raised by the municipalities in their appeal was whether the word "township" as used in Section 709.19 of the Ohio Revised Code should be interpreted consistently with Section 503.07 of the Ohio Revised Code and, thus, include a municipal corporation that had not detached itself from the township.

The Court of Appeals, in its decision filed on December 15, 1983, held that for the purposes of Section 709.19 of the Ohio Revised Code the word "township" must be interpreted consistently with that word as it is used elsewhere throughout the Ohio Revised Code. Thus, the Court of Appeals' decision found that the total taxable property in the township includes the taxable property located within a municipal corporation that has not exercised its option of detaching itself from that township.

The petitioner, Board of Trustees, Miami Township, sought to appeal this decision to the Supreme Court of Ohio. On April 4, 1984, the Ohio Supreme Court overruled Miami Township's Motion For an Order Directing The Court of Appeals to Certify Its Record. Miami Township then filed a Motion for Rehearing. This Motion was denied by the Ohio Supreme Court on May 9, 1984.

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IV. REASONS FOR DENYING THE WRIT

A. No Federal Question Presented

Quite simply stated, this case does not present a federal issue to be decided. The Statements of Facts, as submitted by petitioner, as well as by respondents, clearly demonstrate that this case involves the interpretation of a state statute by a state court which directs the apportionment of property taxes between various state political subdivisions. This matter does not infringe upon any federal statutory or constitutional right.

Petitioner has attempted to manufacture a federal claim based upon the Equal Protection clause of the 14th

Amendment to the United States Constitution. Petitioner has cited a plethora of cases involving various facets of law regarding the Equal Protection clause. However, a distinguishing feature of the majority of these cases cited is that they involve the unequal treatment of individual people by various political subdivisions or statutes. *City of Chicago v. Sturges,* 222 U.S. 313 (1911); *Yick Wo v. Hopkins,* 118 U.S. 356 (1886); *Hunter v. Pittsburgh,* 207 U.S. 161 (1907); *Kramer v. Union Free School District,* 395 U.S. 621 (1969); *Harper v. Bd. of Elections,* 383 U.S. 663 (1966); *Cipriano v. City of Houma,* 395 U.S. 701 (1969); *Phoenix v. Kolodziejski,* 399 U.S. 204 (1970); *Goldberg v. Kelly,* 397 U.S. 254 (1970); *Fuentes v. Shevin,* 407 U.S. 67 (1972); *Craig v. Boren,* 429 U.S. 190 (1976); *Dunn v. Blumenstein,* 405 U.S. 330 (1972). A few cases have involved disputes between two or more private parties wherein one of the parties was relying on a state law that created an arbitrary or unfair distinction between parties to the detriment of one of the parties. *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972); *Reed v. Reed,* 404 U.S. 71 (1971). Petitioner has cited no cases for the proposition that state law may not make distinctions between municipal corporations that remain a part of the surrounding civil township and municipal corporations that choose to detach themselves from a neighboring township.

The issues raised in this case are purely those of state law. The proportion of property taxes among political subdivisions in a state remains a matter to be decided by the state legislature. Similarly, the interpretation of that state legislation remains a matter for state courts.

B. Lack of Standing

This Court has consistently held that a political subdivision of a state does not have standing to challenge the constitutionality of a state law. *Stewart v. Kansas City,* 239 U.S. 14 (1915). As the Court stated, in *Stewart:*

> It is manifest that the statute assailed was enacted by the State in regulation of its municipalities, and the power to do this is very broad. . . . This power of creation and control may be exercised in many ways and may give rise to actual or asserted inequalities. It has been exercised to enlarge or contract the boundaries of municipal corporations, invest them with special powers, divide and apportion their property.

Id. at 16. Thus, the Court has recognized that political subdivisions of a state, including townships and municipal corporations, are creatures of that state and cannot challenge the federal constitutionality of a state law regulating them.

The reasoning of the *Stewart* decision was applied specifically to a challenge brought under the Equal Protection clause of the 14th Amendment. *Newark v. New Jersey,* 262 U.S. 192 (1923). In *Newark,* the Court stated:

> The enforcement by the State of the provision of the act imposing upon the City the specified annual payments for such diversion of water does not violate the equal protection clause of the Fourteenth Amendment. The regulation of municipalities is a matter peculiarly within the domain of the State. . . . The City cannot invoke the protection of the Fourteenth Amendment against the State.

Id. at 196. Thus, the Court has previously held that a city cannot invoke the Fourteenth Amendment of the United States Constitution against a state statute. This reason-

ing is just as applicable to a township. A township, as a political subdivision of a state, cannot claim the protection of the Fourteenth Amendment against a state statute.

The issues in these cases have received more recent discussion by the Ninth Circuit Court of Appeals. *South Lake Tahoe v. California Tahoe Regional Planning Agency,* 625 F.2d 231 (9th Cir. 1980). In *Tahoe,* the Ninth Circuit Court of Appeals stated:

> It is well established that 'political subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment.' . . . This is true whether the defendant is the state itself or another of the state's political subdivisions. . . . Thus, the City may not challenge CTRPH's plans and ordinances on constitutional grounds.

Id. at 233.

The Court of Appeals for the Second Appellate District, Montgomery County, Ohio has provided its interpretation of Section 709.19 of the Ohio Revised Code. Petitioner attempted to present this issue to the Ohio Supreme Court but the Supreme Court refused to hear the case. Thus, the interpretation of the word "township" in Section 709.19, as adopted by the Court of Appeals, is the interpretation that stands as the proper one. Thus, petitioner's challenge of this interpretation of Section 709.19 on the ground that it violates the Equal Protection clause of the 14th Amendment is a challenge of the constitutionality of Section 709.19 itself.

———o———

V. CONCLUSION

Annexation of unincorporated township territory by a neighboring municipal corporation is a matter controlled by state law. The state legislature establishes criteria that must be met for an annexation to take place. Petitioners have infused their argument with emotional language, charging among other things that certain annexations are inherently unjust. Clearly, this charge is a contradiction in terms. In order for an annexation to be authorized it must meet the criteria established by law. When the annexation meets these criteria, it is lawful, proper, and just. An annexation that was inherently unjust would not be authorized because it would not meet the lawful requirements.

Section 709.19 of the Ohio Revised Code provides for a system of compensation for a township that loses a set percentage of its tax base to annexations within a twelve-month period. If the term "township" in Section 709.19 is interpreted to be consistent with other Ohio law, the annexations of territory from Petitioner, Miami Township, by Respondents, Cities of Miamisburg, West Carrollton, and Moraine, do not reach the necessary percentage to trigger the compensation mechanism of the statute. The Court of Appeals decision interprets "township" in this manner, and the statute has not been triggered. This question began as and remains an issue of state law.

For these reasons, a writ of certiorari should not be granted.

Respectfully submitted,

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APPENDIX A

OPINION NO. 77-031

Syllabus:

If a municipal corporation fails to initiate proceedings pursuant to R.C. 503.07 to adjust township boundaries, the inhabitants of township territory that has been annexed to such a municipal corporation are still subject to, and eligible to vote on township tax levies and issues.

TO: Ted W. Brown, Secretary of State, Columbus, Ohio
BY: William J. Brown, Attorney General, June 7, 1977

I have before me your request for my opinion inquiring whether the inhabitants of territory that has been annexed to a municipal corporation are eligible to vote on township levies and issues where the municipal authorities have not intiated proceedings to adjust the township limits as provided by R.C. 503.07.

R.C. 503.07 contains provisions by which township boundary lines can be made identical with those of the municipality of which it is part when, for any reason, such lines are not identical. This would be the case in the instant situation where a municipality has, pursuant to R.C. Chapter 731, annexed territority which comprises part of a township. Thus, in such a case the new boundaries of the municipality would extend into the township and conversely the township boundaries would extend into the municipality. The purpose of R.C. 503.07 is to eliminate such a situation by allowing for the alteration of the

township boundary lines to be identical with those of the municipality, so that the part of the township that was annexed would be wholly and exclusively within the municipal boundaries.

If, however, a municipality does not initiate the procedure set forth in R.C. 503.07 the annexed township territory does not cease to be a component part of the township or townships in which it is situated. *Halsey v. Ward,* 17 Ohio St. 544 (1967); 1954 Op. Att'y. Gen. No. 4642, p. 648; 1924 Op. Att'y. Gen. No. 1213, p. 82.

In 1954 Op. Att'y. Gen. No. 4642, p. 648, the first and fourth branches of the syllabus provide as follows:

> "1. The extension of the limits of a municipality by the annexation of territory in an adjacent township does not per se affect the limits or political existence of such township. The municipal authorities may, however, initiate proceedings under the provisions of Section 503.07, Revised Code, to adjust the township limits to make them identical in whole or in part with the municipal limits so as to accomplish the abolition of certain township offices under the provisions of Section 703.22, Revised Code.
>
> ". . .
>
> "4. Where the limits of a municipality extend over into the territory of a township the political existence of a township is not affected and electors of the municipality residing within the overlapping portion of the township may vote for a township trustee, township clerk, justices of the peace and constables to be elected in such township."

It is clear, therefore, that when township and municipal boundaries overlap, the inhabitants of the overlapping

territory are considered residents of both the municipality and the township with all of the benefits and obligations attendant thereto.

The subject of taxation of township property within a municipality was specifically discussed in 1924 Op. Att'y. Gen. No. 1213, p. 82, wherein it was stated:

> "The practice is and seems always to have been to make the general levies of the township to cover all property within the township. Because some part of the territory of a township becomes a village does not seem to operate to take the area within the village out of the township for voting or taxing purposes."

Further, it was noted in this opinion:

> "It will be noted therefore that it is the general rule that a township can levy a tax on all the taxable property located in the township including the property in a village or city within the township, unless an exception is found in the statute providing for the tax."

Thus, it would appear that property of the township, even though it is also located within the limits of a municipality, still retains a complete and independent existence as part of the township. The inhabitants of the territory located within the municipality still retain their full voting rights with regard to the election of the various township officers and the property of such territory still remains subject to township tax levies, unless there is some exception in the statute providing for the specific tax. Accordingly, the owners of such property would clearly have the right to vote on levies and issues which might result in any additional taxation to their property. *See:* 1944 Op. Att'y Gen. No. 7038, p. 406 and 1939 Op. Att'y. Gen. No. 198, p. 249 (dealing with the issue of taxation of the township area located within a municipality).

The problems created when municipal and township boundaries overlap were discussed in 1954 Op. Att'y. Gen. No. 4642, p. 648, where it was noted as follows:

> "It is of course readily foreseeable that where a municipal and a township boundary overlap, in part, inequitable situations may arise both with respect to the citizens of a municipality within the township as well as with respect to citizens of the municipality. For example, the citizens of the municipality might well find themselves subject to taxation both by the township as well as the municipality within which they reside."

As my predecessor specifically noted in the foregoing opinion, it is advisable when a municipality annexes a part of a township that the provisions of R.C. 503.07 be followed as a matter of course in order to avoid the burdensome and inequitable situations that would otherwise result.

In the absence of such a procedure, however, I must conclude that the inhabitants of a township territory that has been annexed to a municipal corporation are still subject to and eligible to vote on township tax levies and issues.

In reaching this conclusion, I am not unaware of the operation and effect of R.C. 709.12. This section, which provides for an apportionment of the indebtedness and a division of the funds of the township between the township and the municipality, when its territory is annexed, provides as follows:

> "When proceedings have been commenced to annex a portion of a township, or portions of more than one township, to a municipal corporation upon which the tax levies made by the board of township trustees

for the payment of the township debt do not apply, the county auditor shall ascertain and apportion the amount of existing net indebtedness of the township which shall be assumed and paid by the municipal corporation. The apportionment shall be made in the proportion of the total duplicate for the annexed territory transferred to the municipal corporation to the total tax duplicate remaining in and for the unannexed portion of the township. The auditor shall ascertain, adjust, and divide between the municipal corporation and the unannexed portion of the township any *unencumbered balance on hand* to the credit of any fund of such township, in the same proportion as is provided in this section for the division and apportionment of indebtedness. No division shall be made of a balance in any fund of a township that is required for the retirement of its indebtedness. In case any net indebtedness is assumed by the municipal corporation as provided in this section, the legislative authority of such municipal corporation shall provide for the payment of such indebtedness by the levy of taxes therefor, or by the appropriation from an appropriate fund. The proceeds of such levy or appropriation shall be transferred to the proper authorities of the township for the final redemption of its indebtedness." (Emphasis added)

It is clear that R.C. 709.12 contemplates the division of all funds whatever their source, except proceeds of tax levies intended for the payment of interest or principle of township indebtedness. However, in 1943 Op. Att'y. Gen. No. 6475, p. 616 my predecessor discussed an earlier version of this statute which was, for purposes of this opinion, identical to the one now in effect. The third branch of the syllabus provides as follows:

"In the division of funds contemplated by Section 3557-1, General Code, [now R.C. 709.12] only the unencumbered balances of funds actually on hand can be considered, and moneys in the process of collection

are not included in the division required by said section."

This proposition was again stated in 1960 Op. Att'y. Gen. No. 1901, p. 720.

Therefore, it is clear that the division of funds contemplated by R.C. 709.12 involves only those unencumbered funds of the township which are on hand at the time of the annexation to the municipality. Any subsequent funds coming into the treasury of the township need not be divided in the manner prescribed by R.C. 709.12. As such, I must conclude that the provisions of R.C. 709.12 in no way alter the conclusions reached above that the inhabitants of the township territory which has been annexed to a municipality would be subject to, and eligible to vote on, township tax levies and issues. The division of the funds contemplated is not ongoing. Rather, it is done only once at the time of the annexation of the township territory.

Therefore, it is my opinion and you are so advised that if a municipal corporation fails to initiate proceedings pursuant to R.C. 503.07 to adjust township boundaries, the inhabitants of township territory that has been annexed to such a municipal corporation are still subject to, and eligible to vote on township tax levies and issues.

APPENDIX B

1. ANNEXATION OF TERRITORY IN ADJACENT TOWNSHIP—EXTENSION, LIMITS OF MUNICIPALITY—DOES NOT PER SE AFFECT LIMITS OR POLITICAL EXISTENCE OF TOWNSHIP—AUTHORITY TO INITIATE PROCEEDINGS TO ADJUST TOWNSHIP LIMITS—MUNICIPAL LIMITS—ABOLITION OF TOWNSHIP OFFICES—SECTIONS 503.07, 503.22 RC.

2. MUNICIPAL CORPORATION — LEGISLATIVE AUTHORITY—PETITION TO COUNTY COMMISSIONERS FOR CHANGE IN TOWNSHIP LIMITS —ERECTION OF NEW TOWNSHIP—PROCEDURE BY COMMISSIONERS—SECTIONS 503.07, 503.14 RC.

3. TOWNSHIP COMPLETELY WITHIN LIMITS OF MUNICIPALITY—SECTION 703.22 RC OPERATIVE—ALL TOWNSHIP OFFICES ABOLISHED —EXCEPTION, JUSTICES OF PEACE AND CONSTABLES—CONTINUE TO EXERCISE FUNCTIONS—THEY ARE ELECTED AT REGULAR MUNICIPAL ELECTIONS.

4. LIMITS OF MUNICIPALITY—EXTENDED OVER TO LIMITS OF TOWNSHIP—POLITICAL EXISTENCE OF TOWNSHIP—NOT AFFECTED—ELECTORS OF MUNICIPALITY RESIDING WITHIN OVERLAPPING PORTION OF TOWNSHIP—MAY VOTE FOR TOWNSHIP TRUSTEE, TOWNSHIP CLERK, JUSTICES OF PEACE AND CONSTABLES TO BE ELECTED IN TOWNSHIP.

5. TOWNSHIP COMPLETELY WITHIN LIMITS OF MUNICIPALITY—WHEN SECTION 703.22 RC BECOMES OPERATIVE—RESIDENTS OF TOWNSHIP—ELECTORS OF CITY EXISTING PRIVILEGES—SECTION 503.07 RC.

SYLLABUS:

1. The extension of the limits of a municipality by the annexation of territory in an adjacent township does not per se affect the limits or political existence of such township. The municipal authorities may, however, initiate proceedings under the provisions of Section 503.07, Revised Code, to adjust the township limits to make them identical in whole or in part with the municipal limits so as to accomplish the abolition of certain township offices under the provisions of Section 703.22, Revised Code.

2. Section 503.07, Revised Code, is mandatory to the extent that where the legislative authority of a municipal corporation properly petitions the board of county commissioners for a change in township limits, in order to make them identical, in whole or in part, with the limits of a municipal corporation, or to erect a new township out of the portion of the township included within the limits of the municipal corporation, said board must, upon the presentation of such petition and in regular or adjourned session, change the limits of the township or erect a new township as provided by Section 503.14, Revised Code.

3. Where a township is completely within the limits of a municipality and there is an identity in whole or in part of township and municipal limits. Section 703.22, Revised Code, becomes operative and all township offices are abolished, except that justices of the peace and constables

continue to exercise their function and are elected at regular municipal elections as provided by said section.

4. Where the limits of a municipality extend over into the territory of a township, the political existence of a township is not affected and electors of the municipality residing within the overlapping portion of the township may vote for a township trustee, township clerk, justices of the peace and constables to be elected in such township.

5. Where a township is completely within the limits of a municipality but no part of the township and municipal limits are or have ever been identical or coterminous, Section 703.22, Revised Code, does not become operative unless and until there has been an appropriate petition to the board of county commissioners pursuant to the provisions of Section 503.07, Revised Code, and residents of said township, notwithstanding they are also electors of the city, may note for township trustees, township Clerks, justices of the peace, and constables to be elected in such township.

Columbus, Ohio, December 15, 1954

Hon. Ted W. Brown, Secretary of State
Columbus, Ohio

Dear Sir:

Your request for my opinion contains the following questions:

"1. Where a municipal corporation extends into one or more townships, do electors of that portion of a city which extends into a township, vote for township trustees, township clerk, justice of the peace, and constable, there being no municipal court in such city?

"2. Where a municipal corporation is formed from three different townships and no part of any of the townships is outside of the boundaries of the municipality, does Section 703.22 of the Revised Code apply, and are such officers elected in such townships where there is no municipal court in such city?"

Your questions relate to a situation where no municipal court existed, and will be so considered, since municipal courts have jurisdiction within the corporate limits of their respective municipal corporation and within the townships specifically designated by the municipal court act, the statute providing that, "upon the institution of a municipal court, the jurisdiction of justices of the peace and police justices in all civil and criminal causes terminates in any township or municipal corporation which is entirely within the territory and in that part of any township which is included within the territory." See Sections 1901.02 and 1901.04, Revised Code.

With respect to your first inquiry, it has been held that upon the organization of a city the limits of which are not coterminous with those of any township, the territory within such city does not cease to be a component part of the township or townships within the limits of which it is situated; that "in the offices of township trustee, clerk, treasurer, justice of the peace and constable, electors and taxpayers of the city have in some or in all respects, a like interest with the electors of the townships outside the city limits, and are entitled to vote in the choice of them." Halsey v. Ward, 17 Ohio St., 543; 28 Ohio Jurisprudence, p. 1079, Sec. 670.

The court in its opinion at page 546, said:

"Neither as a matter of theory or practice, is there any necessary difficulty in the existence and harmoni-

ous working of a civil township organization, and, at the same time, of a city organization within the limits of such township, or within the limits of more than one township; and the statutes nowhere provide, either expressly or by just implication, that, on the organization of a city within the limits of a township or townships, the territory within the city limits shall cease to be a part of the township or townships from which the same was taken. But, there are clear indications of a contrary legislative intent."

The Halsey case was followed in Opinion 1213, Opinions of the Attorney General for 1924, page 82, where it was said:

"Because some part of the territory of a township becomes a village does not seem to operate to take the area within the village out of the township for voting or taxing purposes. Village electors vote for township officers and are often elected as such officers."

The political existence of the township in such case was also upheld in Opinion No. 198, Opinions of the Attorney General for 1939, p. 249, involving a vote on a tax levy for the establishment of a firemen's indemnity fund. It was there held that a township could levy such tax on all taxable property lying in the township, including the property in a village located in the township.

Opinion No. 7038, Opinions of the Attorney General for 1944, page 406, went even further. It sustained a township levy for maintaining a township park, despite the total absorption of the township by the incorporation of two municipalities. It was stated in the syllabus:

"The fact that all the area of a township has been incorporated into two municipalities does not in any way affect the existence or official organization of the

township, and taxes levied or to be levied for township purposes will be collected and paid into the township treasury as provided by law."

The Attorney General thus gave his reasons, at page 409, for not applying Section 703.22, Revised Code, 3512, G. C.:

> "It will be observed from an examination of the above quoted section, that it applies only when the corporate limits of *a city or village* become identical with those of a township. It is obvious that the legislature enacted that statute in recognition of the fact that where the territory of a township was identical with that of a municipal corporation there could be no purpose in having two sets of officers administering the affairs of the subdivision and therefore all township offices excepting those of justices and constables were abolished and their duties are to be performed by municipal officers. Plainly, that reason does not exist where the entire territory of a township becomes incorporated into two or more municipal corporations and obviously it would not be practicable for the officers and council or either one of such municipalities to take over the government of the entire township. Accordingly, it seems clear to me that the existence of Conneaut Township has been in no wise affected, and the entire township, including the city of Conneaut and the village of Lakeville, is still subject to control as a township by the officers who are provided by law for all townships of the state. * * *" (Emphasis added.)

It is, therefore, apparent that as a general rule a township retains its existence as a political entity, notwithstanding the inclusion of some or all of its territory within the municipal limits. In arriving at this conclusion I am, moreover, aware of the provisions of Section 703.22, Revised Code, which provides in substance that upon iden-

tity of municipal and township limits township offices generally cease and the duties thereof are assumed by the corresponding offices of the municipal corporation. The section, however, does not purport to abolish the township, but merely the offices thereof.

It is, of course, readily forseeable that where a municipal and a township boundary overlap, in part, inequitable situations may arise both with respect to the citizens of a municipality within the township as well as with respect to citizens of the township without the boundaries of the municipality. For example, the citizens of the municipality might well find themselves subject to taxation both by the township as well as the municipality within which they reside. Opinion No. 1213, supra. At the same time, assuming a situation where that portion of a township lying within the limits of the municipality was more densely populated in comparison to the rest of the township, the residents of the township without the boundaries of the municipal corporation might well find that their township affairs are virtually controlled by the urban residents who might conceivably have little or no appreciation of the problems peculiar to the non-urban territory. It should be noted, however, that neither the urban residents of the township nor the residents of the township without the boundaries of the municipality are without a statutory remedy in such case. With respect to the remedies of the residents of the municipal corporation, Section 503.07, Revised Code, provides as follows:

> "If the limits of a municipal corporation do not comprise the whole of the township in which it is situated, or if by change of the limits of such corporation include territory lying in more than one township, and

the legislative authority of such municipal corporation, by a vote of the majority of the members of such legislative authority, petitions the board of county commissioners for a change of township lines in order to make them identical, in whole or in part, with the limits of the municipal corporation, or to erect a new township out of the portion of such township included within the limits of such municipal corporation, the board, on presentation of such petition, with the proceedings of the legislative authority authenticated, at a regular or adjourned session, may change the boundaries of the township or erect such new township."

Insofar as the residents of the township outside the municipal boundaries are concerned, Section 503.09, Revised Code, likewise provides:

"Where a township contains a city, if a majority of the freehold electors owning land in the portion of such a township outside such city limits, petitions, with a map accurately setting forth such territory, praying to have such territory erected into a new township, and excluding the territory within the city, the board of county commissioners shall enter an order erecting such territory into a new township, the boundaries of which need not include twenty-two square miles of territory. Upon the erection of such new townships, the territory lying within the limits of the city in the original township shall be considered as not being located in any township."

For the purpose of avoiding some of the situations which I have heretofore outlined, it would undoubtedly be advisable in those cases where a municipality annexes a part of a township, that the provisions of Section 503.07, supra, be followed as a matter of course and as an incident to the annexation proceedings. Although Section 503.07, supra, uses the permissive "may" with respect to the change of the boundaries of the township upon the

petition of the legislative authority of the municipality I am nevertheless of the opinion that such a boundary change is mandatory upon the board of county commissioners if as and when a proper petition is presented by the municipal corporation. My conclusion in this respect is based largely on the provisions of Section 503.14, Revised Code, which provides as follows:

> "When the change of boundaries of township is required by reason of the extension of the limits of a municipal corporation, such change shall be made be (sic) annexation to the township in which the municipal corporation or the greater part of it was previously situated, of such parts of other townships as are covered by such extension."

The section above quoted was originally enacted as section 482 of the Municipal Code in 70 Ohio Laws, 4. As originally enacted it provided substantially the same as present Section 503.14, Revised Code, except that after the word "required" the words "under Section 480" appeared. Section 480 of the former Municipal Code is now substantially Section 503.07, Revised Code. Notwithstanding that this section reference was eliminated upon the incorporation of the Municipal Code into the General Code and subsequently upon the incorporation of the General Code into the present Revised Code. I am nevertheless convinced that no substantial change was intended and that the use of the word "required" was intentional and not accidental, and indicated a legislative understanding that when a petition was duly presented to the Board of County Commissioners for an appropriate change in the township boundaries, that such change was then a "required" one and was therefore mandatory.

Considering now the second aspect of your inquiry, it would appear that it resolves itself into a determination

as to whether under the circumstances disclosed, Section 703.22, Revised Code, to which I have referred earlier in this opinion, applies. Said section provides as follows:

> "When the limits of a municipal corporation become identical with those of a township, all township offices shall be abolished, and the duties thereof shall be performed by the corresponding officers of the municipal corporation, except that justices of the peace and constables shall continue the exercise of their functions under municipal ordinances providing offices, regulating the disposition of their fees, their compensation, clerks and other officers and employees. Such justice and constables shall be elected at regular municipal elections. All property, moneys, credits, books, records, and documents of such township shall be delivered to the legislative authority of such municipal corporation. All rights, interests, or claims in favor of or against the township may be enforced by or against such municipal corporation."

A diagram which you have enclosed for the purpose of clarifying the problem presented by your second inquiry discloses a municipal corporation composed of three adjacent townships. No portion of any of the townships is without the limits of the municipal corporation. Each of the townships has at least one common limit with the municipal corporation. Obviously, no one of the townships has a limit which is completely coterminous with the municipality, since, perforce it enjoys a common limit with one or more adjacent townships. The question then presented is whether any of the limits of any of the townships within the municipal corporation are identical within the purview of Section 703.22, supra, so as to abolish the existence of certain township offices as enumerated by that section. It is apparent, of course, that there is no complete and absolute identity of any one of the limits of

the township with the limits of the municipal corporation, under the facts as stated in your inquiry. Such a situation could only arise where the municipality was composed of a single township or where having been formed from several townships the municipality had the limits of the several townships changed under Section 503.07, Revised Code, into a single township. I think it clear that the legislature intended no such restrictive application of Section 703.22, supra. On the contrary, it would appear to have been the legislative notion to avoid a duplication of governmental functions where a township had been completely absorbed within the limits of the municipal corporation. Thus, in the question you have presented, it would appear that the partial identity of the township limits with those of the municipality, providing the township is completely within municipal limits, is sufficient to bring into operation Section 703.22, supra. Construing Section 703.22, supra, and Section 503.07, supra, in pari materia, it would appear that this is what the legislature had in mind in providing for a petition to change township lines in order to make them identical in whole or "in part" as provided by the latter section.

What has been said, however, does not answer the question which although not directly asked by you is nevertheless implicit in the foregoing discussion; that is to say, that circumstance in which a township is completely within municipal limits but no portion of the township limit is coterminous with any part of the municipal limit. Despite the legislative intent in this regard to avoid the duplication of governmental functions to which I have previously referred, there is no identity of limits, whole or partial, within the plain meaning of that word as employed in Sec-

tion 703.22, supra. In such a case construction cannot supply what plain language has failed to indicate; and the interpretation of the statute must be made in the light of the expressed intention thereof, notwithstanding the expressed intention might differ from the intended legislative expression. Slingluff v. Weaver, 66 Ohio St., 621. It follows, therefore, that in the case of a township which is completely within the limits of a municipal corporation, which does not share and has never shared any common limit with the municipal corporation, Section 703.22, supra, cannot come into operation and township offices are not abolished under and pursuant to that Section until and unless the legislative authority of the municipal corporation makes an appropriate petition to the board of county commissioners under Section 503.07, supra, in order to achieve such identity in whole or in part.

In specific answer to your questions, it is my opinion that:

1. The extension of the limit of a municipality by the annexation of territory in an adjacent township does not per se affect the limits or political existence of such township. The municipal authorities may, however, initiate proceedings under the provisions of Section 503.07, Revised Code, to adjust the township limits to make them identical in whole or in part with the municipal limits so as to accomplish the abolition of certain township offices under the provisions of Section 703.22, Revised Code.

2. Section 503.07, Revised Code, is mandatory to the extent that where the legislative authority of a municipal corporation properly petitions the board of county com-

missioners for a change in township limits, in order to make them identical, in whole or in part, with the limits of a municipal corporation, or to erect a new township out of the portion of the township included within the limits of the municipal corporation, said board must, upon the presentation of such petition and in regular or adjourned session, change the limits of the township or erect a new township as provided by Section 503.14, Revised Code.

3. Where a township is completely within the limits of a municipality and there is an identity in whole or in part of township and municipal limits, Section 703.22, Revised Code, becomes operative and all township offices are abolished, except that justices of the peace and constables continue to exercise their function and are elected at regular municipal elections as provided by said section.

4. Where the limits of a municipality extend over into the territory of a township, the political existence of a township is not affected and electors of the municipality residing within the overlapping portion of the township may vote for a township trustee, township clerk, justices of the peace and constables to be elected in such township.

5. Where a township is completely within the limits of a municipality but no part of the township and municipal limits are or have ever been identical or coterminous, Section 703.22, Revised Code, does not become operative unless and until there has been an appropriate petition to the board of county commissioners pursuant to the provisions of Section 503.07, Revised Code, and residents of said township, notwithstanding they are also electors of the city, may vote for township trustees, township clerks,

justices of the peace, and constables to be elected in such township.

Respectfully,

C. William O'Neill
Attorney General

APPENDIX C

AM. SUB. SENATE BILL 138
Eff. 12-27-79

Passed 11-30-79 Approved by Governor 12-27-79
Filed 12-27-79 File No. 180
Chief Sponsor: Cox

To enact section 709.19 of the Revised Code to require an annexing municipal corporation to make payments under certain conditions to the township affected by the annexation, or under certain other conditions to another municipal corporation, and to declare an emergency.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That section 709.19 of the Revised Code be enacted to read as follows:

Sec. 709.19 (A) As used in this Section: (1) "Antain municipal annexations

Sec. 709.19 (A) As used in this Section: (1) "Annexation Period" means a period of one, two, or three consecutive twelve-month periods, which ever is less, during which one or more municipal corporations annex territory of a township that includes at least fifteen per cent but less than one hundred per cent of the total taxable value of the real, public utility and tangible personal property subject to taxation in that township in the base year. No annexation period shall include a month that is part of another annexation period.

(2) "Base Year" means the calendar year immediately preceding an annexation period.

(3) "Taxes" means the real and public utility property taxes charged by a township in the base year and payable after the reduction required by Division (A) of Section 319.301 of the Revised Code but prior to the reduction required by Division (B) of such section, and the taxes levied for such year by the township against tangible personal property. "Taxes" excludes taxes for the payment of debt charges.

(4) "Township Taxes in the Annexed Territory" means the taxes against the real, public utility, and tangible personal property subject to taxation in the base year in territory annexed from the township to a municipal corporation during an annexation period.

(B) If the annexation of territory of any township by one or more muncipal corporations under this chapter constitutes an annexation period of twelve consecutive months, except as provided in Division (E) of this section. Each municipal corporation that annexed territory of that township during that annexation period shall pay the township during each of the seven years following the annexation period:

(1) In each of the first three years, one hundred per cent of the township taxes in the annexed territory;

(2) In the fourth year, eighty per cent of the township taxes in the annexed territory;

(3) In the fifth year, sixty per cent of the township taxes in the annexed territory;

(4) In the sixth year, forty per cent of the township taxes in the annexed territory;

(5) In the seventh year, twenty per cent of the township taxes in the annexed territory.

(C) If the annexation of territory of any township by one or more municipal corporations under this chapter constitutes an annexation period of thirteen to twenty-four consecutive months, except as provided in Division (E) of this section, each municipal corporation that annexed territory of that township during that annexation period shall pay the township during each of the six years following the annexation period:

(1) In each of the first two years, one hundred per cent of the township taxes in the annexed territory;

(2) In the third year, eighty per cent of the township taxes in the annexed territory;

(3) In the fourth year, sixty per cent of the township taxes in the annexed territory;

(4) In the fifth year, forty per cent of the township taxes in the annexed territory;

(5) In the sixth year, twenty per cent of the township taxes in the annexed territory;

(D) If the annexation of territory of any township by one or more municipal corporations under this chapter constitutes an annexation period of twenty-five to thirty-six consecutive months, except as provided in Division (E) of this section, each municipal corporation that annexed territory of that township during that annexation period shall pay the township during each of the five years following the annexation period:

(1) In the first year, one hundred per cent of the township taxes in the annexed territory;

(2) In the second year, eighty per cent of the township taxes in the annexed territory;

(3) In the third year, sixty per cent of the township taxes in the annexed territory;

(4) In the fourth year, forty per cent of the township taxes in the annexed territory;

(5) In the fifth year, twenty per cent of the township taxes in the annexed territory.

(E) If after an annexation period for which payments are being made or are to be made to a township by one or more municipal corporations under Division (B), (C), or (D) of this section, the remainder of the unincorporated territory of the township is annexed to another municipal corporation or incorporates as a municipal Corporation, the balance of the payments due the township under division (B), (C) or (D) of this section shall be made to the municipal corporation to which the remainder of the township territory was annexed or to the municipal corporation incorporated from the remainder of the township territory.

No payment shall be made to a municipal corporation pursuant to this division unless the remainder of the unincorporated territory of the township referred to in this division constitutes at least fifty per cent of the area of the unincorporated area of the township prior to the annexation period.

(F) After consultation with the chief executive officer of the municipal corporation and the board of township trustees, the county auditor shall determine by which of the following methods the municipal corporations that

annexed township territory shall pay the township the amounts prescribed in divisions (B) to (D) of this section, except that if the payments are made pursuant to Division (E) of this Section, they shall be made by the first method listed below:

(1) The county auditor shall issue a warrant semiannually against the taxes charged and payable against real and public utility property located in the municipal corporation and the taxes levied against tangible personal property located in the municipal corporation, and the county treasurer shall distribute such amount to the township or, pursuant to Division (E) of this section, to the municipal corporation to which the remainder of the township territory was annexed or to the municipal corporation incorporated from the remainder of the township territory; or

(2) The county budget commission shall pay such amounts to the township from the amount apportioned to the municipal corporations from the undivided local government fund. The payment shall be over and above the amount apportioned to the township pursuant to Section 5747.51 or 5747.53 of the Revised Code, and the apportionment of the municipal corporations shall be reduced by like amounts.

(G) Upon written notification to the county auditor and the chief executive officer of each municipal corporation that annexes township territory during an annexation period, a board of township trustees may decline to accept the payments required under Divisions (B), (C), and (D) of this Section, and a municipal corporation may decline to

accept the payments required under Division (E) of this Section.

SECTION 2. Petitions for annexation filed pursuant to Chapter 709, of the Revised Code that are pending on the effective date of this act shall be governed by the terms of this act.

SECTION 3. This act is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, and safety. The reason for such necessity lies in the fact that immediate action is necessary to ensure that pending annexations will not be excluded from the provisions of the act. Therefore, this act shall go into immediate effect.

VERNAL G. RIFFE, JR.
Speaker of the House of Representatives.

OLIVER OCASEK
President of the Senate.